THE TAYLER LAW FIRM, P.C.
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Attorney for Plaintiff
San Diego Bike & Kayak Tours, Inc.

FILED
07 NOV 14 AM 8:35
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

'07 CV 2173 L (CAB)

SAN DIEGO BIKE & KAYAK TOURS, INC., a California corporation,

Plaintiff,

v.

LA JOLLA KAYAK & COMPANY, LLC, a limited liability company, LA JOLLA KAYAK, LLC, a California corporation; MICHAEL LUSCOMB, an individual; SHARON LUSCOMB, an individual,

Defendants.

CASE NO.:

COMPLAINT FOR

(1) DECLARATORY RELIEF OF NON-INFRINGEMENT OF UNREGISTERED TRADEMARK; AND

(2) DECLARATORY RELIEF OF NON-INFRINGEMENT OF REGISTERED TRADEMARK NO. 3,297,782

Plaintiff San Diego Bike & Kayak Tours, Inc. ("SDB&KT") alleges as follows:

THE PARTIES

1. Plaintiff SDB&KT is a California corporation with its principal place of business at 2222 Avenida De La Playa, La Jolla, California, 92037. Plaintiff is located in La Jolla Shores and provides kayak, bike and snorkeling rentals and kayak and bike tours primarily in La Jolla including La Jolla Cove, the La Jolla caves, and La Jolla Shores.

2. Plaintiff is informed and believes, and therefore alleges, that Defendant La Jolla Kayak & Company, LLC is a California limited liability company with its principal place of business at 2199 Avenida de la Playa, La Jolla, California 92037.

3. Plaintiff is informed and believes, and therefore alleges, that Defendant La Jolla Kayak, LLC is a California corporation with its principal place of business at 2199 Avenida de la Playa, La Jolla, California 92037, based on La Jolla Kayak, LLC's allegation in its Complaint in Case No. GIC 878641 in California Superior Court for the County of San Diego.

4. Plaintiff is informed and believes, and therefore alleges, that Defendants Michael Luscomb and Sharon Luscomb, own and operate Defendants La Jolla Kayak & Company, LLC and La Jolla Kayak, LLC, and are individuals residing in the county of San Diego, State of California. Defendants La Jolla Kayak & Company, LLC, La Jolla Kayak, LLC, Michael Luscomb and Sharon Luscomb are referred to herein collectively as "Defendants" or "LJK."

JURISDICTION AND VENUE

5. This action seeks a declaration that Plaintiff's use of the words "La Jolla" and "kayak" (both separately and together) and variations thereof, do not, and will not, infringe upon any trademark-related rights or other rights of Defendants.

6. This Court has original jurisdiction over the claim for declaratory relief under 28 U.S.C. §§ 1338 and 2201 because Plaintiff brings this action to determine a question of actual controversy between the parties arising under the trademark laws of the United States, including the Lanham Act, 15 U.S.C. §§ 1121 and 1125. This Court also has original jurisdiction under 28 U.S.C. § 1338(b) and supplemental jurisdiction under 28 U.S.C. § 1367 for the related state-law claims.

7. This Court has personal jurisdiction over Defendants because Defendants each reside in California. Furthermore, Defendants have purposely availed themselves of the privileges of conducting activities in California, the claim arises out of Defendants' forum-related activities, and the exercise of jurisdiction is reasonable.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because Defendants reside in this judicial district and the events giving rise to this Complaint occurred in this judicial district

FACTUAL BACKGROUND

9. SDB&KT is a small local business located in La Jolla, California, that provides kayak, bike and snorkeling tours and rentals primarily in and around La Jolla, including kayak tours in the coastal areas from La Jolla Shores to La Jolla Cove, including the La Jolla caves. SDB&KT has provided kayak tours in La Jolla since early 2004. Since that time, SDB&KT has advertised its goods and services highlighting its location in La Jolla, its kayaking services, and the fact that it offers rentals and tours for those who desire to kayak in La Jolla. At various times SDB&KT has used the words and phrases "La Jolla," "kayak," "La Jolla kayaking," "kayaking in La Jolla," "kayak in La Jolla," "La Jolla kayak tours," "La Jolla kayak rentals" and other variations on the words "La Jolla" and "kayak" to describe its services. SDB&KT also has registered to do business as "La Jolla Kayak Tours."

10. SDBK&T is informed and believes, and therefore alleges, that the words "La Jolla" and "kayak" and variations of such words both separately and collectively have been used in multiple forms of advertising by approximately 10 other businesses permitted by the City of San Diego to provide kayaking tours and rentals in and around La Jolla.

11. SDBK&T is informed and believes, and therefore alleges, that LJK owns United States Trademark Registration No. 3,297,782. United States Trademark Registration No. 3,297,782 is for a service mark that includes a picture with the words "La Jolla Kayak" written at the top of the picture in a particular style. The application for this service mark was filed after SDBK&T began offering kayak tours in La Jolla. During prosecution of the service mark application, the examiner required a disclaimer: "Applicant must insert a disclaimer of LA

JOLLA KAYAK in the application because the wording is merely descriptive of applicant location and/or where applicant provides its services and the nature of the services." The examiner explained that "A 'disclaimer' is thus a written statement that an applicant adds to the application record that states that applicant does not have exclusive rights, separate and apart from the entire mark, to particular wording and/or to a design aspect." In response to the examiner, LJK agreed to the disclaimer stating "No claim is made to the exclusive right to use 'La Jolla Kayak' apart from the mark as shown." The disclaimer appears on the face of the Certificate of Registration.

12. LJK has asserted that SDB&KT's use of the words "La Jolla" and "kayak" or forms thereof in advertising its business violates LJK's allegedly exclusive rights to use those words in advertising its business. On April 7, 2007, counsel for LJK asserted in a letter that the use of "La Jolla" in telephone listings with Verizon and Cingular "is misleading and confusing to the general public" and "is predatory of the goodwill La Jolla Kayak...."

13. In addition, on May 31, 2007, in a lawsuit LJK filed against Nicholas Bauman (who is a former employee of LJK and is now a shareholder of SDB&KT) in California Superior Court for the County of San Diego, LJK asserted in its discovery responses that "San Diego Bike and Kayak lists their business phone in information services, Verizon, Cingular, and SBC, under the name 'La Jolla Kayaking' . . . The listing of San Diego Bike and Kayak's phone number under "La Jolla Kayaking" is extremely misleading." That assertion was made in response to an interrogatory asking for information related to LJK's claim of unfair competition alleged against Mr. Bauman. In those same discovery responses, LJK also asserted that a "Rack Card" distributed by SDB&KT is "confusingly similar" to a "Rack Card" created and used by LJK and that by using that "Rack Card" SDB&KT misleads and confuses members of the public. Those discovery responses were verified by Defendant Sharon Luscomb as an owner of La Jolla Kayak, LLC.

14. On July 13, 2007, counsel for LJK told counsel for SDB&KT that SDB&KT's use of the phrases such as "La Jolla kayak tours," "La Jolla kayak rentals" and "La Jolla kayaking" in its internet advertising through companies such as Google and Yahoo! was

confusing and misleading to members of the public and violated LJK's exclusive right to use such terms in advertising its business.

15. On November 7, 2007, in its litigation against Mr. Bauman, LJK served written discovery seeking information related to SDB&KT's alleged infringement of LJK's trade name and trademark, including SDB&KT's use of AdWords or keywords in advertising on Google, Yahoo! and similar companies. LJK's discovery specifically sought documents and other information regarding SDB&KT's use of the terms "La Jolla kayaking," "La Jolla kayak," "La Jolla kayak rentals" or "a combination of the preceding terms on San Diego Bike and Kayak Tours, Inc.'s website or in any other media of advertising." Upon being made aware of this discovery, SDB&KT became apprehensive that LJK intended to sue SDB&KT for alleged infringement of its claimed trademark rights to "La Jolla Kayak" and "La Jolla Kayaking."

FIRST CAUSE OF ACTION

(Declaratory Relief – Non-Infringement of Unregistered Trademark Under Federal Law and California Law)

16. SDB&KT realleges and incorporates by reference paragraphs 1 through 15 above as through fully set forth herein.

17. As a result of Defendants' actions, there is an actual controversy between SDB&KT on the one hand and Defendants on the other as to the parties' rights and legal relations associated with SDB&KT's use of the words "La Jolla" and "kayak" and variations thereof alone and in combination in advertising its goods and services. As set forth above, SDB&KT has a reasonable and real apprehension that it faces an immediate lawsuit by Defendants for infringement of Defendants' alleged non-registered trademark rights under federal law and under the laws of the State of California.

18. SDB&KT contends that its use of "La Jolla" and "kayak" and variations thereof does not infringe any federal or state trademark, trade name, competition, or related rights of Defendants and that SDB&KT's actions do not constitute violations of any such rights under any federal or state statute or law, including but not limited to the Lanham Act, 15 U.S.C. § 1125, California Business & Professions Code § 17200 et seq., and/or California Business & Professions Code § 17500 et seq. On information and belief, Defendants contend that

SDB&KT's use of those words does infringe federal and state trademark, trade name, unfair competition, and related rights of Defendants.

19. SDB&KT intends to continue to use the words "La Jolla" and "kayak" and variations on these words both separately and together in its business in commerce. Thus, an actual case or controversy exists within the meaning of 28 U.S.C. § 2201 as to whether SDB&KT's use of "La Jolla" and "kayak" and variations thereof in its business of providing kayak, bike and snorkeling rentals and kayak and bike tours in La Jolla constitutes unfair competition or infringes any trademark rights of Defendants. A judicial determination is necessary and appropriate at this time in order that the parties may ascertain their respective rights and obligations, if any.

20. SDB&KT does not engage in any activities that harm or threaten any lawful rights of Defendants and is entitled to a declaration to that effect in this action.

SECOND CAUSE OF ACTION

(Declaratory Relief – Non-Infringement Of Registration No. 3,297,782)

21. SDB&KT realleges and incorporates by reference paragraphs 1 through 20 above as through fully set forth herein.

22. As a result of Defendants' actions, there is an actual controversy between SDB&KT on the one hand and Defendants on the other as to the parties' rights and legal relations associated with SDB&KT's "Rack Card" and advertising. As set forth above, SDB&KT has a reasonable and real apprehension that it faces an immediate lawsuit by Defendants for alleged infringement of Defendants' registered trademark rights under Registration No. 3,297,782.

23. SDB&KT contends that its use of its "Rack Card" and/or other advertising does not infringe the service mark in Registration No. 3,297,782, or any other federal or state trademark, trade name, or related rights of Defendants. On information and belief, Defendants contend that SDB&KT's "Rack Card" and/or other advertising does infringe federal and state trademark, trade name, and related rights of Defendants.

24. SDB&KT intends to continue to use its "Rack Card" and continue its advertising in connection with its business. Thus, an actual case or controversy exists within the meaning of 28 U.S.C. § 2201 as to whether SDB&KT's use of its "Rack Card" and/or other advertising infringes any valid trademark rights of Defendants. A judicial determination is necessary and appropriate at this time in order that the parties may ascertain their respective rights and obligations, if any.

25. SDB&KT does not engage in any activities that harm or threaten any lawful rights of Defendants and is entitled to a declaration to that effect in this action.

PRAYER FOR RELIEF

WHEREFORE Plaintiff requests:

(a) That the Court declare that SDB&KT's use of the words "La Jolla" and "kayak" and variations thereof (either separately or together) does not infringe upon or violate any trademark, competition, or other rights of Defendants under the laws of the United States or the State of California;

(b) That the Court declare that SDB&KT has not infringed and is not infringing the service mark in Registration No. 3,297,782;

(c) That the Court declare that SDB&KT's activities have not caused any damages or harm to Defendants or brought any unjust enrichment to SDB&KT;

(d) That the Court declare that SDB&KT is not liable to Defendants;

(e) That SDB&KT be awarded its reasonable costs, expenses and attorneys fees to the extent permitted by law; and

(f) That SDB&KT be awarded such further relief as is just and equitable.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury on all issues triable by jury.

Dated: November 14, 2007

Respectfully Submitted,

THE TAYLER LAW FIRM, P.C.

By ______________________
William C. Tayler
Attorney for Plaintiff
San Diego Bike & Kayak Tours, Inc.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

# 144439 - BH
*** * C O P Y * ***
November 14, 2007
08:36:38

Civ Fil Non-Pris
USAO #.: 07CV2173 CIVIL FILING
Judge..: M. JAMES LORENZ
Amount.: $350.00 CK
Check#.: BC# 1370

Total-> $350.00

FROM: SAN DIEGO BIKE & KAYAK V.
LA JOLLA KAYAK
CIVIL FILING

JS 44
(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

FILED
07 NOV 14 AM 8:33
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

I. (a) PLAINTIFFS
SAN DIEGO BIKE & KAYAK TOURS, INC., a California corporation

DEFENDANTS
LA JOLLA KAYAK & COMPANY, LLC, a limited liability company; LA JOLLA KAYAK, LLC, a California coporation; MICHAEL LUSCOMB, an individual; SHARON LUSCOMB, an individual

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT San Diego
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
THE TAYLER LAW FIRM, P.C.
1804 Garnet Avenue, No. 505
San Diego, CA 92109
(858) 272-8574

ATTORNEYS (IF KNOWN)
'07 CV 2173 L (CAB)

II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY)

- [ ] 1 U.S. Government Plaintiff
- [X] 3 Federal Question (U.S. Government Not a Party)
- [ ] 2 U.S. Government Defendant
- [ ] 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

	PT	DEF		PT	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)
Declaration of Trademark Non-Infringement Under 15 U.S.C. Section 1125

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT
- [ ] 110 Insurance
- [ ] 120 Marine
- [ ] 130 Miller Act
- [ ] 140 Negotiable Instrument
- [ ] 150 Recovery of Overpayment & Enforcement of Judgment
- [ ] 151 Medicare Act
- [ ] 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- [ ] 153 Recovery of Overpayment of Veteran's Benefits
- [ ] 160 Stockholders' Suits
- [ ] 190 Other Contract
- [ ] 195 Contract Product Liability

REAL PROPERTY
- [ ] 210 Land Condemnation
- [ ] 220 Foreclosure
- [ ] 230 Rent Lease & Ejectment
- [ ] 240 Torts to Land
- [ ] 245 Tort Product Liability
- [ ] 290 All Other Real Property

TORTS

PERSONAL INJURY
- [ ] 310 Airplane
- [ ] 315 Airplane Product Liability
- [ ] 320 Assault, Libel & Slander
- [ ] 330 Federal Employers' Liability
- [ ] 340 Marine
- [ ] 345 Marine Product Liability
- [ ] 350 Motor Vehicle
- [ ] 355 Motor Vehicle Product Liability
- [ ] 360 Other Personal Injury

PERSONAL INJURY
- [ ] 362 Personal Injury - Medical Malpractice
- [ ] 365 Personal Injury - Product Liability
- [ ] 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- [ ] 370 Other Fraud
- [ ] 371 Truth in Lending
- [ ] 380 Other Personal Property Damage
- [ ] 385 Property Damage Product Liability

CIVIL RIGHTS
- [ ] 441 Voting
- [ ] 442 Employment
- [ ] 443 Housing/ Accommodations
- [ ] 444 Welfare
- [ ] 440 Other Civil Rights

PRISONER PETITIONS
- [ ] 510 Motion to Vacate Sentence

HABEAS CORPUS:
- [ ] 530 General
- [ ] 535 Death Penalty
- [ ] 540 Mandamus & Other
- [ ] 550 Civil Rights
- [ ] 555 Prison Conditions

FORFEITURE/PENALTY
- [ ] 610 Agriculture
- [ ] 620 Other Food & Drug
- [ ] 625 Drug Related Seizure of Property 21 USC 881
- [ ] 630 Liquor Laws
- [ ] 640 R.R. & Truck
- [ ] 650 Airline Regs.
- [ ] 660 Occupational Safety/Health
- [ ] 690 Other

LABOR
- [ ] 710 Fair Labor Standards Act
- [ ] 720 Labor/Mgmt. Relations
- [ ] 730 Labor/Mgmt. Reporting & Disclosure Act
- [ ] 740 Railway Labor Act
- [ ] 790 Other Labor Litigation
- [ ] 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- [ ] 422 Appeal 28 USC 158
- [ ] 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- [ ] 820 Copyrights
- [ ] 830 Patent
- [X] 840 Trademark

SOCIAL SECURITY
- [ ] 861 HIA (13958)
- [ ] 862 Black Lung (923)
- [ ] 863 DIWC/DIWW (405(g))
- [ ] 864 SSID Title XVI
- [ ] 865 RSI (405(g))

FEDERAL TAX SUITS
- [ ] 870 Taxes (U.S. Plaintiff or Defendant)
- [ ] 871 IRS - Third Party 26 USC 7609

OTHER STATUTES
- [ ] 400 State Reappointment
- [ ] 410 Antitrust
- [ ] 430 Banks and Banking
- [ ] 450 Commerce/ICC Rates/etc.
- [ ] 460 Deportation
- [ ] 470 Racketeer Influenced and Corrupt Organizations
- [ ] 810 Selective Service
- [ ] 850 Securities/Commodities/ Exchange
- [ ] 875 Customer Challenge 12 USC 3410
- [ ] 891 Agricultural Acts
- [ ] 892 Economic Stabilization Act
- [ ] 893 Environmental Matters
- [ ] 894 Energy Allocation Act
- [ ] 895 Freedom of Information Act
- [ ] 900 Appeal of Fee Determination Under Equal Access to Justice
- [ ] 950 Constitutionality of State Statutes
- [ ] 890 Other Statutory Actions

VI. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)
- [X] 1 Original Proceeding
- [ ] 2 Removal from State Court
- [ ] 3 Remanded from Appellate Court
- [ ] 4 Reinstated or Reopened
- [ ] 5 Transferred from another district (specify)
- [ ] 6 Multidistrict Litigation
- [ ] 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND $** To be determined
CHECK YES only if demanded in complaint:
JURY DEMAND: [X] YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE ____ Docket Number ____

DATE November 14, 2007
SIGNATURE OF ATTORNEY OF RECORD [signature] William C. Tayler

PAID $350 11/14/07 BH RCPT # 144439

::ODMA\PCDOCS\WORDPERFECT\22816\1 January 24, 2000 (3:10pm)

CR